SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1213

WAYNE MINNICK, *et al.*,
Petitioners,

CALIFORNIA DEPARTMENT
OF CORRECTIONS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents California Department of Corrections, *et al.* respectfully request the Court to deny the petition for writ of certiorari seeking review of the California Court of Appeal's decision in this case. The Court of Appeal's opinion is reported at 95 Cal. App. 3d 506, *modified,* 96 Cal. App. 3d 626a, 157 Cal. Rptr. 260 (1979).

QUESTIONS PRESENTED

1. Whether the California Court of Appeal correctly applied the compelling state interest/strict scrutiny test (which Petitioners concede is the applicable constitutional standard) in upholding the constitutionality of an affirmative action program which involves no quotas or positions exclusively set aside for persons of one race or sex, but merely permits race and sex to be considered among many other factors in making hiring and promotional decisions?

2. Whether a voluntary affirmative action program which grants a limited preference in hiring and promotion to female and minority employees to eliminate traditional patterns of racial and sexual segregation within a state agency is permissible under Title VII of the Civil Rights Act of 1964 and this Court's decision in *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, ____ U.S. ____, 47 U.S.L.W. 4851 (June 27, 1979)?

STATEMENT OF THE CASE

This case involves the legality of an Affirmative Action Plan (AAP) adopted by the California Department of Corrections which grants a limited preference in hiring and promotion to minority and female employees. Relying on this Court's decisions in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) (hereafter "*Bakke*"), and *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, ____ U.S. ____, 47 U.S.L.W. 4851 (June 27, 1979) (hereafter "*Weber*"), the California Court of Appeal rejected Petitioners' contention that the AAP violates the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964. *Minnick* v. *California Department of Corrections*, 95 Cal. App. 3d 506, *modified*, 96 Cal. App. 3d 626a, 157 Cal. Rptr. 260 (1979). Petitioners do not contend that the decision below conflicts with *Bakke* or *Weber*. They merely assert that the Court of Appeal erred in applying the standards set forth in those cases because it misconstrued the record. Thus, although

the general subject matter of affirmative action is of considerable importance, Petitioners' claims are primarily factual and present no legal issues worthy of the Court's attention.

The Affirmative Action Plan at issue in this case was formulated in an effort both to remedy chronic discrimination within the Department of Corrections that had restricted employment and promotional opportunities for minorities and women (R.T. 338, 665, 707; Exs. "G", "Q", "R") and to lessen racial violence within California's prisons by increasing the number of minority and female correctional officers. C.T. 703, 704.[1] Under the Plan, the Department gives consideration to the composition of the work force and the race and sex of applicants when such factors are relevant to the needs of the position being filled and the other qualifications of the individual applicants. As the California Court of Appeal found (Pet. App. at A-15-A-16), no applicant is excluded from consideration for hiring or promotion under the AAP because of his or her race or sex. R.T. 195-97, 382-83, 488, 666-77, 707-08.

The petition for certiorari accuses the Department of having "set aside positions" exclusively for minorities and women. Pet. at 2; *see also id.* at 7, 16. The Superior Court made no such finding despite Petitioners' request. C.T. 617-20, 643-46. The Court of Appeal explicitly found that while race or sex is a " 'plus' in competition for promotion or transfer" (Pet. App. at A-16), the qualifications of all applicants are weighed fairly and competitively and no positions in the Department are "beyond the reach of male or nonminority employees." *Id.* The Department has never adopted—much less attempted to defend in this litigation—a policy of exclusively setting aside positions for applicants of one race or sex. While at times there has been some misunderstanding within the Department con-

[1] The record in this case consists of a Clerk's Transcript in three volumes and a Reporter's Transcript in ten. The Clerk's Transcript will be cited hereafter as "C.T." and the Reporter's Transcript as "R.T.".

cerning the AAP, when misinterpretations such as those cited by Petitioners have come to the Administration's attention, corrective measures have been taken. *See, e.g.*, C.T. 664 800-01.[2]

This action was commenced in December, 1975, when Petitioners, two white male correctional officers and the California Correctional Officers Association, filed their complaint, contending that the AAP discriminates against white males in violation of various state and federal constitutional and statutory provisions. C.T. 6-7, 69. The individual Petitioners alleged that they had been denied promotions pursuant to the AAP because they were Caucasian. C.T. 8, 10, 69-73.

During the course of pretrial proceedings, before the *Bakke* case was decided by the California Supreme Court (*Bakke* v. *Regents of the University of California,* 18 Cal. 3d 34, 132 Cal. Rptr. 680 (1976)), the Department took the position "for purposes of this litigation" that it had not engaged in an express policy of illegal or improper discrimination against individuals on the basis of race or sex; it did, however, allege that its past hiring and promotional practices and procedures had had an adverse discriminatory impact on minorities and women. C.T. 122-23. While some evidence regarding past

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[2] The recitation of evidence contained in the Petition on this point (Pet. at 7-8) is quite misleading. Among other things, Petitioners have failed to cite conflicting evidence in the record (*e.g.*, R.T. 284-85, 369-70, 378-81, 442, 494, 678-70, Ex. 10), and to point out instances in which the Department's Administration disavowed and corrected misstatements of policy. *E.g.*, R.T. 674-74, 684-86, 775-77, 800-01; C.T. 192. Petitioners also cite instances in which female only certifications have been requested from the State Personnel Board (Pet. at 7), although the Superior Court's injunction and Title VII both recognize that sex can be a bona fide occupational qualification. *See* n.6, *infra.*

discrimination within the Department was introduced at trial,[3] the Department's defense was made largely without reference to past discriminatory practices.

On January 5, 1977, the Court issued its Notice of Intended Decision, which reads in pertinent part as follows:

> "The testimony and documentary evidence herein show, and defendants admit, that defendants have carried on a campaign to, and they do now, select applicants for employment and for promotion based on their sex and on their racial background or ancestry.
>
> "Defendants seek to justify their actions on the basis that while the sex of an applicant is *one* of the factors considered, the applicant must be otherwise qualified for the duties to be performed. Sex or racial background is not the *sole* factor considered. Plaintiffs on the other hand assert that the hiring or promotion of a person based in whole or in part on sex or racial background or ancestry is unconstitutional and void.
>
> "The Court agrees with plaintiffs." (C.T. 375 (emphasis in original)).

On April 5, 1977, before the trial court settled findings, the Department filed a Motion to Augment Record, requesting the Superior Court to receive evidence regarding the past and continuing discriminatory practices that the AAP was designed in part to remedy. C.T. 670-71. The Department brought this evidence before the court in the form of declarations submitted with the motion and further offered to produce live testimony

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[3] With respect to racial discrimination, *see, e.g.*, Exs. "C", at 20; Ex. "Q"; R.T. 212-13, 234, 338, 344, 370-72, 443, 681, 696-97, 706-08, 774, 824-25, 867-73, 879, 893, 903. With respect to sex discrimination, *see, e.g.*, Ex. "I"; R.T. 555-57, 608, 698.

by the declarants. C.T. 696. Defendants argued that augmentation of the record was necessary, in light of the California Supreme Court's opinion in *Bakke*, to obtain a complete understanding of the deliberate discrimination against minorities and women that necessitated the Affirmative Action Plan. C.T. 693-95.

On April 14, 1977, a hearing was held on the Motion to Augment Record. At this hearing, the court stated its belief that the evidence of prior discrimination tendered by the Department was irrelevant to the issue of whether race and sex might appropriately be considered in hiring or promotion:

> "THE COURT: Well, two wrongs don't make a right. And if they've been doing that in the past, it's high time they stopped, you see. That's all it amounts to. I don't see the relevance if they've been discriminating for generations." (R.T. 1029).

On May 5, 1977, the court denied the motion on the basis that the proffered evidence was irrelevant. At the same time, and for the same reason, the Superior Court refused the Department's request for specific findings on the past discrimination within the Department. C.T. 1192-93; R.T. 1431-33.[4]

On October 11, 1977, the Superior Court entered Findings of Fact and Conclusions of Law, a Judgment and Declaratory Judgment, and a Permanent Injunction. C.T. 1196-1216. Petitioners conceded that there was no evidence that either of the two named plaintiffs, or any other specific individual, had been

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[4] As noted above (p.5 and n.3, *supra*), the trial record contained some evidence of this prior discrimination, which would have been sufficient to sustain such a finding. Indeed, at several points, the trial court appeared to acknowledge the existence of prior discrimination, and to suggest that no further proof was necessary to establish that fact. R.T. 344, 380, 426-27, 661-62, 708, 883.

denied promotions by the Department because of their race or sex (R.T. 921), and no such finding was entered. *See* R.T. 1335-36, 1339. The Superior Court felt, however, that "discrimination against one is discrimination against all" (R.T. 1336) and concluded that the Department's employment practices violated the Fourteenth Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e), and state statutory and constitutional provisions. C.T. 1210. Accordingly, the Superior Court issued a Permanent Injunction, prohibiting the Department "from hiring or promoting any employee . . . in which preference, advantage, or benefit is given to race, color, sex or national origin." C.T. 1214.[5] At the same time, however, based upon findings recognizing "the unique and sensitive nature of the functions of the Department of Corrections and the peculiar difficulties inherent in the administration of California's prison system," the Superior Court provided that race or sex could be considered by the Department in determining employee job assignments and responsibilities because such consideration was "necessary . . . to serve the compelling state interest[s] in promoting the safety of correctional officers and inmates, encouraging inmate rehabilitation, minimizing racial tensions, and furthering orderly and efficient prison management." C.T. 1209-10.[6]

On appeal, the California Court of Appeal reversed. *Minnick* v. *California Department of Corrections*, 95 Cal. App. 3d 506 (1979), *modified*, 96 Cal. App. 3d 626a, 157 Cal. Rptr. 260 (1979). While it found that the Superior Court's absolute proscription of consideration of race and sex in hiring and promotion had been "entirely proper" under the California Supreme Court's decision in *Bakke*, the court held that the

[5] The Court of Appeal stayed the injunction pending the Department's appeal. *See* Pet. App. at A-12.

[6] The injunction also excepted male-only, female-only and bilingual certifications when "the job-related aspect of the certification can be objectively and demonstrably shown as established." C.T. 1214.

subsequent decision of this Court in that case rendered the injunction invalid. Pet. App. at A-15. Recognizing that *Bakke* upholds race-conscious admissions programs where "race . . . does not insulate the individual from comparison with all other candidates for the available seats" (*Regents of the University of California* v. *Bakke*, 438 U.S. 265, 317 (1978)(Powell, J.), cited in Pet. App. at A-15), the court concluded, after conducting an independent review of the evidence (*id.* at A-4), that the Department's affirmative action policies "closely fit[ ]" the kind of program which *Bakke* held constitutional. *Id.* at A-15. The court found that the numerical goals contained in the AAP were not "functional quotas" of the sort condemned in *Bakke* because "[t]here was no evidence that any specific number or percentage of positions were reserved for members of either sex or of any racial or ethnic group." *Id.* at 7. Thus, the AAP did not suffer from the constitutional vice which led to the rejection of the U.C. Davis admissions program: the denial of individualized consideration to non-minority applicants.

The Court of Appeal also concluded that the AAP was "necessary to promote the compelling interest of [the] State in the proper management of its correctional system" (*id.* at A-17) because attainment of its affirmative action goals "would serve inmate-related objectives of the Department by improving relationships with prisoners and reducing severe racial conflict and violence within the State prison system." *Id.* at A-5. In so concluding, the court relied on both the evidence presented by the Department and the trial court's finding that consideration of race and sex in determining employee job assignments and responsibilities is necessary "to serve the compelling state interest[s] in promoting the safety of correctional officers and inmates, encouraging inmate rehabilitation, minimizing racial tensions, and furthering orderly and efficient prison management." C.T. 1210. In the eyes of the Court of Appeal, this finding "effectively determined" (Pet. App. at A-15) that the Department's AAP served the same compelling interests, for if consideration of race and sex in

transferring employees and determining their job assignments furthered these goals, the same would be true of consideration of race and sex in the related areas of hiring and promotion.[7]

The Court of Appeal thus concluded that the Department's AAP satisfied the "strict scrutiny" test because it did not foreclose male and nonminority employees from individualized consideration and because it was necessary to serve compelling state interests. *Id.* at 17. On the question of whether the AAP violated Title VII, the court held that Petitioners' claim was foreclosed by this Court's decision in *Weber*, which the court read as validating "race conscious affirmative action plans" like the AAP. Pet. App. at B-2. The Court of Appeal also reversed the Superior Court's conclusions that the Department's AAP violated other provisions of federal and state law; since the Petition does not contend that the Court of Appeal erred in these respects, there is no need to discuss these aspects of the court's opinion here.[8]

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[7] Because it viewed consideration of race and sex in hiring and promotion as *per se* unconstitutional, the Superior Court did not decide whether such consideration might be justified by the same compelling interests which it found justified consideration of race and sex in transferring employees and determining their responsibilities.

[8] Because it found that the AAP was justified by the state's compelling interest in prison management, the Court of Appeal did not consider whether the evidence relating to prior discrimination which the Department tendered with its Motion to Augment Record also justified the Department's program. It did hold, however, that the Superior Court did not abuse its discretion in denying that motion, which it (unlike the Superior Court) indicated was made too late. Pet. App. at A-23. The Court of Appeal stated, however, that were the case retried, the admissibility of this evidence could be considered anew, in light of Justice Powell's opinion in *Bakke*. *Id.*

ARGUMENT

I.

SINCE THE CALIFORNIA COURT OF APPEAL CORRECTLY FOUND THAT THE DEPARTMENT'S AAP IS CONSTITUTIONALLY PERMISSIBLE UNDER THE "COMPELLING STATE INTEREST/STRICT SCRUTINY" TEST, THE CASE PRESENTS NO IMPORTANT QUESTIONS OF LAW WHICH NEED BE DECIDED BY THIS COURT.

Petitioners acknowledge, as they must, that this Court's decision in *Bakke* permits the use of racial classifications upon a showing "that the use of [the] classification is precisely tailored to serve [a] compelling governmental interest . . . ." Pet. at 14. They also acknowledge that the Court of Appeal in this case, relying on *Bakke,* found that the Department's employment practices promoted the state's "compelling state interest in a safe and efficient correctional system . . . ." *Id.* at 12. Petitioners' quarrel with the decision below is not, therefore, that the Court of Appeal applied the wrong legal standard, but that it misread the trial court record. We shall show *infra* that this contention is meritless, but even if it were not, the claim that a lower court—particularly a state court—made erroneous factual determinations in applying a concededly correct legal standard scarcely warrants review by this Court. *United States* v. *Johnston,* 268 U.S. 220, 227 (1925); *cf. Stone* v. *Powell,* 428 U.S. 465 (1976).[9]

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[9] Thus, contrary to Petitioners' assertion, this case does not present the question "whether a state public employer may grant preferences in hiring and promotion, based on sex or race, where there is no evidence of past employment discrimination." Pet. at 26. That question was settled by *Bakke,* which clearly holds that a state may classify by race where necessary to further a compelling state interest. *Bakke, supra,* 438 U.S. 265, 305 (Powell, J.), *id.* at 359

(footnote continued on following page)

Petitioners' assault on the Court of Appeal's opinion has three separate prongs. First, they claim that the state's concern in orderly prison management is not a compelling state interest sufficient to justify the granting of racial and sexual preferences. Pet. at 14-15. Second, they say that even if the state's interests in reducing prison violence and maintaining security are compelling, the evidence at trial did not show that the AAP promoted these interests. *Id.* at 16-19. Third, they argue that the AAP is in fact a quota system which exclusively reserves positions for minorities and women and uses impermissible benchmarks in establishing its employment goals. *Id.* at 16, 20-21. None of these arguments has merit.

In the first place, even the most casual reader of this Court's reports could scarcely be unaware of the importance which the Court consistently has attached to the state's "self-evident" interest in preserving order and authority in its prisons. *Jones* v. *North Carolina Prisoners' Union,* 433 U.S. 119, 132 (1977). The compelling nature of this interest has led the

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(Opinion of Brennan, White, Marshall and Blackmun, JJ.). While Petitioners claim that "even the . . . *Bakke*-type of preference [i.e. one which does not exclude applicants from consideration] is not constitutional in the employment context" (Pet. at 16), they offer no reasons why the use of race is constitutionally acceptable if supported by a compelling state interest in education, but not employment.

Moreover, this is emphatically not a case where there is "no evidence of past employment discrimination." Pet. at 26. As shown *supra* at pp. 5-6, the Department tendered to the Superior Court extensive evidence of its own prior discrimination which that court rejected as irrelevant. While the Court of Appeal held that the Superior Court could properly have excluded this evidence on the ground that it was tendered too late (Pet. App. at A-23), the opinion also contemplated that the evidence of prior discrimination might be relevant if the case were to be retried. *See* n.8, *supra.* Thus, even if the "per se" rule half-heartedly advanced by Petitioners were adopted so that a state employer could not use racial preferences in hiring or promotion except to compensate for prior discrimination, the Department's program would still be constitutionally acceptable.

Court on repeated occasions to accommodate constitutional guarantees to the state's interest in maintaining a safe and secure prison system. *See, e.g., Jones* v. *North Carolina Prisoners' Union, supra,* (associational rights); *Procunier* v. *Martinez,* 416 U.S. 396 (1974) (free speech: mail censorship); *Pell* v. *Procunier,* 417 U.S. 817 (1974)(free speech: press interviews); *Houchins* v. *KQED, Inc.,* 438 U.S. 1 (1978)(free speech: press access to prisons); *Adderley* v. *Florida,* 385 U.S. 39 (1966)(free speech: right of assembly on jail grounds); *Wolff* v. *McDonnell,* 418 U.S. 539 (1974)(due process). One need not denegrate the First Amendment interest in academic diversity found compelling in *Bakke* to state that it scarcely compares, in terms of human life and limb, with the state's interest in maintaining order and security in its prisons. Petitioners' argument that this interest is insufficiently important to justify the Department's AAP must be rejected.[10]

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[10] The cases cited in text cannot be distinguished on the ground that they involve merely the constitutional rights of convicted felons, for they also hold that rights of members of the public at large may be curtailed by the compelling state interests in maintaining prison order and security. *See, e.g., Procunier* v. *Martinez, supra,* (although censorship of prison mail works a substantial restriction on First and Fourteenth Amendment rights of those who correspond with prisoners, it is justified if it furthers "one or more of the substantial governmental interests of security, order and rehabilitation." 416 U.S. at 413); *Pell* v. *Procunier, supra,* 417 U.S. at 829-35; *Adderley* v. *Florida, supra* (members of the public have no right to demonstrate on jail grounds). Moreover, other cases decided by the Court hold that governmental employees in positions closely analogous to correctional officers may find their rights substantially restricted due to the nature of their employment. *Kelley* v. *Johnson,* 425 U.S. 238 (1976) (policemen); *Parker* v. *Levy,* 417 U.S. 733, 753-57 (1974) (servicemen). Indeed, in this Court's most recent case on the rights of servicemen, it cited *Procunier* v. *Martinez, supra,* in holding that the regulations at issue there restricted speech "no more than [was] reasonably necessary to protect the substantial governmental interest." *Brown* v. *Glines,* ____ U.S. ____, 48 U.S.L.W. 4095, 4097 (January 21, 1980).

Second, Petitioners contend that "[t]he record is devoid of evidence that the racial classifications used were necessary to achieve the articulated state goal." Pet. at 21. They claim that increasing the number of minority and female correctional officers will not serve the state's compelling interest in orderly prison management because "the personal behavior of the officer towards inmates, rather than his/her race, [is] determinative" of how that correctional officer will contribute to the goal of reducing interracial prison violence. *Id.* at 17-18.

This argument—like many others in the Petition—mischaracterizes the record. There is no doubt that the ability to relate to people—of all races and both sexes—differs for different individuals. But the evidence at trial established that race or sex may be one pertinent factor, among others, affecting the ability of an individual to communicate with and to relate to members of a particular race or sex. R.T. 324-25, 343-44, 383, 445, 459-61, 478-79, 550, 564-65, 591, 620-32, 852-901. The AAP takes both individual variations and the knowledge that race or sex may bear on the ability of an individual to relate to others into account; it does so by offering *all* employees individualized consideration and giving preference to race and sex only when the preferred employee is otherwise qualified for the position under racially neutral civil service statutes and race or sex is relevant to the needs of the Department with respect to the particular position being filled. *See* pp. 3-4, *supra.* The AAP thus furthers the state's interests in prison management and security by enabling the Department to cope with what the Court of Appeal termed "the prison-related realities of race and sex." Pet. App. at A-15.[11]

[11] In upholding the AAP, the Court of Appeal also relied on the Superior Court's finding that consideration of race and sex in determining employee job assignments served the same compelling interests which the Department contends justify the AAP. Pet. App. at A-15-A-16. Petitioners attack this reliance on two grounds. First, they say that even if race and sex may be considered in determining

(footnote continued on following page)

Finally, Petitioners contend that the Court of Appeal mistakenly failed to recognize that the Department's AAP is a quota system which excludes white male employees from individualized consideration for hiring and promotion. They also claim that the AAP's numerical goals, which are established with reference to the inmate population (for minorities) and the statewide labor pool (for women), are unconstitutional.

But, as the Court of Appeal correctly determined, the AAP is not a quota system. *See* pp. 3-4, 8, *supra*. The Court of Appeal explicitly considered Petitioners' argument that the numerical goals in the AAP converted it into a quota system

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job responsibilities, the evidence did not support consideration of these factors in hiring and promotion because "there was no evidence that there was not already a sufficient number of minorities to fulfill the Department's needs with respect to assignments and responsibilities" without the AAP. Pet. at 18. This statement is incorrect. Particularly at supervisorial levels, there remains a pronounced absence of minorities throughout the Department. Ex. "L"; "N" at 17, 24. At some prisons the problem is especially acute. For example, at San Quentin Prison, Folsom Prison and Deuel Vocational Institution—three prisons with many extremely dangerous inmates with histories of racial violence—there were, as of the end of 1976, only two Blacks and three Mexican-Americans out of 85 custodial supervisors. C.T. 560. There are simply not enough minority correctional officers in the Department's workforce so that consideration of race and sex in transferring employees and determining job responsibilities can substitute for the AAP.

Petitioner's second argument is that consideration of race or sex in hiring and promotion is and should be subject to more exacting scrutiny than consideration of the same factors in determining job responsibilities. Even if this were true, the need for considering race and sex in hiring and promotion in the prison context serves interests which the Court has repeatedly recognized as compelling. *See* pp. 11-12, *supra*. Hence, whatever sub-level of strict scrutiny is applied to this case, the AAP passes constitutional muster.

and rejected it, holding that the goals were not quotas of the type prescribed by Justice Powell's opinion in *Bakke:*

> "Each [of the numerical goals set forth in the AAP] is an optimum 'quota' to the extent it defines a goal to be attained in the future. Neither is a functional 'quota' which now operates to place either—or any—percentage of positions in the Department beyond the reach of male or non-minority employees." (Pet. App. at A-16)

This finding is supported by substantial evidence.[12] R.T. 369-70, 380-81, 494, 678-80, Ex. 10. Along with the Court of Appeal's finding that the AAP serves compelling state interests, it also vitiates the claim that the AAP's numerical goals are impermissible. Once it is recognized that increasing the number of minority correctional officers is a constitutionally permissible response to "the prison-related realit[y] of race" (Pet. App. at

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[12] Petitioners rely heavily on the Court of Appeal's statement that:

> "[v]acancies in specific positions were *occasionally* left open, and promotions or transfers to them were *sometimes* delayed, until qualified female or minority employees could be found to fill them. Some of these positions were labeled 'female only,' or with words similarly referring to sex (including 'male only') or to race or ethnic background." (Pet. App. at A-7 (emphasis added)).

Despite Petitioners' argument to the contrary (Pet. at 6), there is no contradiction between this statement and the court's conclusion that the AAP is not a quota system. As noted at pp. 3-4 and n.2, *supra*, the Department acknowledges that positions were "occasionally" reserved for persons of a specific race or sex. But these isolated instances do not reflect the Department's policies, which have never countenanced such practices. Because the Department does not defend setting aside exclusive positions and, indeed, has taken steps to prevent this from occurring, the validity of such practices is not at issue here. What is at issue is the legitimacy of the Department's stated policies and, as the Court of Appeal correctly noted, those policies confine the use of race in accordance with the standards articulated in Justice Powell's opinion in *Bakke*.

A-15), basing the minority employment goal on the percentage of minority inmates becomes entirely logical. As for the goal for female employment, no constitutional questions are raised by basing the figure on the statewide labor pool, as opposed to the applicant flow or the labor pool in the immediate area surrounding the institutions. Even where important constitutional rights are affected, government need not use so fine a scapel. *Buckley* v. *Valeo,* 424 U.S. 1, 30 (1976). In any event, since these percentages only represent goals to be attained in the future and do not operate to exclude white male employees from consideration for hiring and promotion, the specific numbers which the Department has chosen for its employment objectives are constitutionally irrelevant. As long as no positions in the Department are beyond the reach of white male employees and the qualifications of all employees are weighed "fairly and competitively" (Pet. App. at A-16), the specific goals utilized by the Department have only the most marginal effect on non-minority, male employees.[13]

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[13] Moreover, these claims are not squarely presented by the record. The complaint in this action did not specifically assert that the AAP was unconstitutional because it contained numerical goals based on inmate population or the statewide labor force nor did the Superior Court enter any findings on these issues. Rather, both the complaint and the trial court erroneously asserted that any consideration of race or sex in hiring or promotions was unconstitutional and the case was tried on the correctness of that assertion. These claims thus come to the Court unsupported by either a timely assertion by Petitioners or illuminating findings by the trial court.

II.

BECAUSE THE CALIFORNIA COURT OF APPEAL CORRECTLY HELD THAT THE DEPARTMENT'S AAP IS PERMISSIBLE UNDER TITLE VII AND THIS COURT'S DECISION IN *WEBER*, THIS CASE RAISES NO IMPORTANT ISSUES REGARDING THE INTERPRETATION OF THAT STATUTE.

Just as *Bakke* forecloses Petitioners' claims under the Equal Protection Clause, *Weber* forecloses their claims under Title VII. Petitioners attempt, however, to distinguish *Weber* on several grounds. First, they say that as to public employees, "Title VII should be construed to incorporate the commands of the Fourteenth Amendment"; they thus argue that *Weber's* validation of affirmative action plans is inapplicable to public employers. Pet. at 22. Second, they assert that the AAP is more "intrusive upon the rights of innocent parties" (*id.* at 23) than the plan upheld in *Weber* (a) because the AAP involves preferences given to other minorities and women, as well as blacks (*id.* at 23); (b) because the AAP is not temporary, as was the program in *Weber* (*id.* at 24); (c) because the plan in *Weber* was collectively bargained while the AAP was unilaterally imposed by the Department (*id.* at 24-25); and (d) because the Department's plan places an unduly heavy burden on the expectations of white male employees. *Id.* at 25. All these attempts to distinguish *Weber* fall short of the mark.

In the first place, Petitioners cite no support for the remarkable proposition that Title VII should be construed to mean one thing for private employers and another for public employers. If *Weber* holds (as it does) that certain affirmative action plans are permissible under Title VII if adopted by private employers, similar plans are also permissible—as far as Title VII is concerned—if adopted by public ones. While public employers, though not private ones, are subject to the strictures of the Equal Protection Clause *in addition to* Title VII,

there is no warrant for Petitioners' assertion that Title VII as applied to public employers tracks the Fourteenth Amendment. Indeed, *Washington* v. *Davis*, 426 U.S. 229 (1976), upon which Petitioners otherwise rely, explicitly holds that the standards for determining a violation of the Equal Protection Clause and a violation of Title VII are quite different.

Second, the fact that *Weber* approved preferences granted to blacks while this case involves preferences granted to other minority groups and women as well as blacks is true but irrelevant. Nothing in *Weber* limits the reach of that case to affirmative action programs directed to blacks. The Court has on many occasions acknowledged that members of other minority groups and women have been subject to long-standing discrimination which is at least comparable, if not identical, to that suffered by blacks. *See, e.g., Keyes* v. *School District No. 1*, 413 U.S. 189, 197-98 (1973) (Negroes and Hispanics both suffer discrimination in education compared to whites); *Hernandez* v. *Texas*, 347 U.S. 475 (1954) (persons of Mexican descent recognized as separate class for purpose of proving discrimination in composition of grand and petit juries); *Lau* v. *Nichols*, 414 U.S. 563 (1974) (Chinese students obtained relief under Title VI of the 1964 Civil Rights Act); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (discrimination against Chinese held prohibited by Fourteenth Amendment); *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975) (recognizing historic discrimination against women); *Kahn* v. *Shevin*, 416 U.S. 351 (1974) (same). Indeed, as far as preferences based on sex are concerned, the constitution and Title VII permit an equal, if not a greater, range for remedial action than is the case for race. *Kahn* v. *Shevin, supra*, (remedial statute granting widows greater benefits than widowers upheld as reasonably designed to further state policy of redressing unequal burden which loss of a spouse imposes on wives); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977). The fact that persons other than blacks receive the benefits of the limited preferences granted by the AAP thus furnishes no ground for distinguishing this case from *Weber*.

Third, Petitioners say this case is different from *Weber*, because here there is "no evidence that the Department's AAP is temporary . . . ." Pet. at 24. This statement is factually incorrect. The AAP at issue in this action was intended to last for five years from its inception in 1974, or until June 30, 1979. The AAP has now been succeeded by an "Equal Employment Opportunity Plan" which will be reviewed annually in accordance with California civil service regulations. The Department thus contemplates careful yearly review to insure that the limited racial and sexual preferences authorized by its policies are still needed.

Fourth, the fact that the plan approved in *Weber* was contained in a collective bargaining agreement is irrelevant. The holding of that case is that "Title VII . . . does not condemn all private, voluntary, race-conscious affirmative action plans" (47 U.S.L.W. at 4855), and nothing in the decision limits the reach of that holding to plans agreed to by a union. Accepting Petitioners' argument would lead to the paradoxical result that an employer without a union would have less freedom of action that one whose employees were unionized—a result that would doubtless surprise students of labor relations.

Finally, Petitioners assert that the AAP imposes a greater burden on the expectations of white male employees than the plan upheld in *Weber*. This is not the case. The AAP is, if anything, more moderate than the *Weber* plan. That plan reserved fifty percent of the positions in a craft training program for blacks; by contrast, the Department's program, as the Court of Appeal found, reserves no positions exclusively for employees of one race or sex, but leaves employees free to "fairly and competitively" compete for promotion. Pet. App. at A-16. Nor does the AAP "unnecessarily trammel the interests of the white employees." 47 U.S.L.W. 4855. It "does not require the discharge of white workers and their replacement with new black hires" or "create an absolute bar to the advancement of white employees." *Id.* Even with the AAP, most promotions go to white male employees. C.T. 563. Approval of the AAP under Title VII follows inescapably from the decision of this Court in *Weber*.

III.

CERTIORARI SHOULD BE DENIED BECAUSE OF THE PROCEDURAL POSTURE OF THE CASE.

Even if this case otherwise presented the issues which Petitioners claim it does, the procedural history of the case renders exercise of this Court's jurisdiction inappropriate. This is so for three reasons. First, in its present posture, this case comes to the Court with a truncated record, with much of the evidence presented by the Department as to its own prior discrimination having been excluded by the Court of Appeal on state procedural grounds. Pet. App. at A-23. Second, the case was presented to the trial court and decided by that court on the erroneous legal theory that racial and sexual preferences are "per se" unconstitutional. Because of this, neither Petitioners nor the Superior Court focused on the issues which Petitioners now claim are worthy of this Court's attention. Third, there is substantial doubt that the judgment of the Court of Appeal is a "final judgment" within the meaning of 28 U.S.C. § 1257 so as to give this Court jurisdiction.

As noted *supra* at pp. 5-6, after the trial of this matter, but before a decision had been rendered by the Superior Court, the Department proffered voluminous evidence regarding its past and present discriminatory practices. C.T. 670-981. The Superior Court refused this evidence. The Court of Appeal affirmed its ruling because the evidence was presented too late. Pet. App. at A-23. The Court of Appeal specifically stated, however, that it was not deciding whether the proffered evidence was relevant; it noted that if the case were to be retried,

"Justice Powell's decision in *U.S. Bakke* will be pertinent to the determination of [this] question." *Id.*[14]

As far as the evidence of prior discrimination is concerned, this case comes to the Court in a unique posture. This evidence is concededly relevant to the legality of the Department's AAP, for even Petitioners admit that a public employer may use racial preferences in hiring and promotion if necessary to remedy prior discrimination. Pet. at 14, 20, 27. Hence, if the case were to be retired (*see* pp. 22-23, *infra*), evidence of the Department's prior discrimination surely would be admissible, despite the fact that this evidence, as a matter of state procedural law, may now be outside the record. Even if this Court were persuaded that the issues presented by this case were worthy of consideration, it would make little sense to decide these issues on a record which contains serious deficiencies, particularly when those deficiencies may be remedied by future state court proceedings.

Second, the record in this case reflects the fact that Petitioners tried it and the Superior Court decided it on a legal theory which has since been shown to be erroneous: that racial and sexual preference is *per se* unconstitutional, no matter how compelling the interests thereby served. Thus, in this case, as in *Massachusetts* v. *Painten*, 389 U.S. 560 (1968), "the parties did not focus upon the issues now before us" and "the record is not sufficiently clear and specific to permit decision of the . . . questions involved . . . ." *Id.* at 561.

Third, there is substantial doubt as to whether the decision of the Court of Appeal below is a "final judgment" within the meaning of 28 U.S.C. § 1257 so as to give this Court jurisdic-

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[14] Petitioners state (Pet. at 20) that the Court of Appeal agreed with the Superior Court "that evidence of past discrimination was 'irrelevant' to this case," citing page 28 of their Petition's appendix. As noted in text, however, the Court of Appeal expressly refrained from deciding this issue (Pet. App. at A-23) and the statement in the petition is incorrect. It is noteworthy that Appendix A, which Petitioners cite as authority for this statement, contains no page 28.

tion. Under California law, an appellate decision reversing a trial court judgment is deemed an "unqualified reversal" which "ordinarily has the effect of remanding the cause for a new trial on all of the issues presented by the pleadings." 6 Witkin, *California Procedure* (2d ed. 1971), Appeal § 543, p.4484. Moreover, the Court of Appeal's decision may contemplate the possibility of a retrial, since it states that the relevance of the evidence of past discrimination will be decided in accordance with Justice Powell's opinion in *Bakke* if there is a retrial. Pet. App. at A-23. This Court has previously recognized that an "unqualified reversal" under California law is not a final judgment for purposes of granting this Court jurisdiction. *Gospel Army* v. *Los Angeles*, 331 U.S. 543 (1947).

The California rule is, however, subject to an exception which may be applicable to this case. Whether a new trial is permissible turns ultimately on the intent of the appellate court; thus, "when the opinion as a whole establishes a contrary intention, the rule [that 'unqualified reversal' has the effect of remanding the case for a new trial] is inoperative." *Stromer* v. *Browning*, 268 Cal. App. 2d 513, 518-19, 74 Cal. Rptr. 155, 158 (1968); *accord, Barth* v. *B.F. Goodrich Tire Co.*, 15 Cal. App. 3d 137, 92 Cal. Rptr. 809 (1971), *Salaman* v. *Bolt*, 74 Cal. App. 3d 907, 141 Cal. Rptr. 841 (1977). Thus, where an appellate court reversing a judgment in plaintiff's favor holds that the evidence is insufficient as a matter of law to establish plaintiff's claim, plaintiff must disclose what new evidence he wishes to offer to the trial court which would compel a different result (in light of the law of the case established by the appellate opinion) in order to obtain a retrial. *Stromer* v. *Browning, supra*, 268 Cal. App. 2d at 520, 74 Cal. Rptr. at 160.

The present case may well fit within *Stromer*. What the California Court of Appeal did was to weigh the evidence presented by both sides and conclude that Petitioners had not established a constitutional violation. Petitioners have never suggested, either to the California courts or to this Court, that a

different result would obtain if they were allowed to introduce new evidence; rather, they only complain that the Court of Appeal misread the evidence that they have already presented.

In this present posture of the case, therefore, the question of whether the Court of Appeal's decision constitutes a "final judgment" is murky, to say the least. Since Petitioners have the burden of proving entitlement to federal jurisdiction (*Thomson* v. *Gaskill*, 315 U.S. 442 (1942)), and since they are the ones who, if certiorari is denied, would have to establish their right to a new trial in the California courts, the burden should be on them to demonstrate the finality of the judgment which they seek to have reviewed here by unequivocably disavowing any intention to seek a retrial if certiorari is denied. Their silence on this point implies that they are attempting to have their cake and eat it too, by predicating their Petition on the theory that the Court of Appeal's decision is final, while simultaneously preserving their hopes for a retrial in the event certiorari is denied. Only if Petitioners explicitly disclaim any intent to seek a new trial will it be possible to know with the requisite assurance that the judgment under review is final. Absent such a statement, there will be no occasion for the exercise of this Court's jurisdiction.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Dated: March 6, 1980.

Respectfully submitted,

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